PRE-SHA (1)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 1061

PRESQUE-ISLE TRANSPORTATION CO.,
a corporation,

Petitioner,

vs.

CARL KOEHLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF OF PETITIONER.

EDWARD W. HAMILTON,
Counsel for Petitioner.

SANDERS, HAMILTON, DOBMEIER, CONNELLY & MCMAHON,
508 Walbridge Building, Buffalo, New York,
Attorneys for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

CASES CITED.

STATUTES INVOLVED.

IN THE

Supreme Court of the United States

October Term, 1943.

No. .....

PRESQUE-ISLE TRANSPORTATION CO.,
a corporation,

Petitioner,

vs.

CARL KOEHLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Statement.

THE PETITION OF PRESQUE-ISLE TRANSPORTATION CO., A CORPORATION, RESPECTFULLY SHOWS TO THIS HONORABLE COURT:

That action was brought in the United States District Court for the Western District of New York by Carl Koehler v. Presque-Isle Transportation Co.; that the action was originally in the form of a suit in Admiralty, and that Libel

was filed on or about the 26th day of November, 1940; that by agreement of the parties the suit in Admiralty was converted into an action at law under the so-called Jones Act, Title 46, Sec. 88 U. S. C., and an Amended Complaint was filed on the 2nd day of January, 1942; that the Amended Complaint alleged that the defendant was a corporation organized under the laws of the State of Delaware, and engaged in operating a fleet of steam vessels on the Great Lakes, and particularly the vessel registered and known as the "Angeline"; that the plaintiff was in the employ of the defendant company as a wheelsman; that on the 21st day of November, 1940, while the vessel "Angeline" was docked in the Port of Buffalo, New York, for the purpose of removing its cargo, the plaintiff was attacked by a member of the crew, known as "Jerry," also a wheelsman in the employ of the defendant; that he thereupon, under instructions of a third mate of the vessel, left the ship and when he returned later the same member of the crew violently assaulted the plaintiff and caused injuries for which he sought a judgment for damages against the defendant corporation; that the injuries to the plaintiff were caused through the carelessness and negligence of the defendant in that it negligently employed and retained Fred Johnson, a third mate, in its service, and that said Johnson was careless and negligent in the performance of his duties in that he negligently permitted an individual known as "Jerry" to remain in a position to be able to inflict injuries on the plaintiff, with full knowledge of the fact that the said "Jerry" had threatened to inflict personal injuries on the plaintiff, and that the defendant company was careless and negligent in employing and retaining in its employ the wheelsman known as "Jerry" when it had knowledge of his habitual belligerent nature, and in failing to give plaintiff any notice or warning whatsoever.

The defendant filed an Answer January 12, 1942, admitting that it was engaged in commerce on the Great Lakes, and was operating the Steamer "Angeline." It raised an issue, by denial of the other material allegations in the Complaint, and alleged that if the plaintiff sustained any injury while in its employ, it was through no fault of the defendant, but solely through the negligence of the plaintiff, and his own wilful misconduct.

The case went to trial on the Complaint and Answer, on the 16th day of February, 1943. At the close of the plaintiff's case the defendant moved to dismiss the Complaint on the ground that the plaintiff had failed to prove a cause of action, and specifically on the grounds that there was no evidence either that the acts of the employee Todd were within the scope of his authority or done in furtherance of the master's interest.

At the close of all the testimony the defendant moved for a direction of a verdict of no cause of action in favor of the defendant on the ground that the plaintiff failed to show the defendant knew or had notice that Todd was of a vicious or belligerent character, that the altercation between the plaintiff and Todd was a purely personal affair, and on the ground that Todd was not acting within the scope of his authority or in the interest of the master. Upon this motion the Court reserved decision and submitted three specific questions to the jury, viz.:

1.—Was Todd of a vicious and belligerent nature, and likely to inflict bodily harm upon other members of the crew?

2.—If so, was that fact known to the officers of the ship, or should it have been known to them in the exercise or ordinary diligence?

3.—Was plaintiff's physical condition, as revealed by the hospital records at Cleveland, the natural result of the injuries he received in the fight on the ship?

The Jury answered each specific question in the affirmative, and rendered a general verdict in favor of the plaintiff for $3000. The Court thereupon entertained the defendant's motion for a directed verdict, the decision of which had been reserved, and thereafter, on April 17, 1943, handed down a decision granting the motion. After a reargument, and on July 30, 1943, the Court rendered a decision allowing the verdict to stand.

An Order was entered on this decision on September 14, 1943, and, on the same day, judgment for the plaintiff in the sum of $3163 was entered. From the Order and Judgment so entered, the defendant appealed to the United States Circuit Court of Appeals for the Second Circuit. The case was argued in the Circuit Court of Appeals on March 9, 1944. Decision was handed down affirming the Judgment of the District Court, on the 24th day of March, 1944. Judgment was entered in the Office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit on the 19th day of April, 1944, affirming the Order and Judgment so appealed from.

A certified copy of the entire record of said case in the District Court and in the Circuit Court of Appeals is hereby furnished, marked "Exhibit A," and made a part of this application.

Reasons for Granting Writ.

Petitioner assigns as error:

(a) The refusal of the District Court to grant the motion of the defendant for a directed verdict in favor of the defendant on the grounds:

1.—That there was no showing of actionable negligence on the part of the ship owner.

2.—That there was no sufficient evidence that defendant's employee Todd was of a vicious or belligerent disposition.

3.—That there was no evidence that the defendant knew or had notice that its employee Todd was of a vicious or belligerent character.

4.—That the altercation between the plaintiff and Todd was a purely personal affair.

5.—That Todd was not acting within the scope of his authority or in the interest of the master.

(b) That the United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment and Order of the District Court, and in not reversing the same.

Petitioner is advised and believes that the Judgment of the Court of Appeals is erroneous and contrary to decisions of this Honorable Court, in like and similar cases, and particularly the case of *Davis v. Greene*, 260 U. S., 349; that the District Court and the Court of Appeals have decided under the facts in this case that the ship owner, without regard to its negligence, is liable to an employee on board ship for injuries inflicted upon him by a fellow employee, and that in so doing they have so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Title 28, Sec. 347, U. S. C.

Prayer.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in said case, entitled "Carl Koehler, Plaintiff-Appellee, vs. Presque-Isle Transportation Co., Defendant-Appellant", to the end that the said case may be reviewed and determined by this Court, as provided by Sec. 347, Title 28, U. S. C., and that the said Judgment of said Court of Appeals in said case may be reversed by this Honorable Court.

PRESQUE-ISLE TRANSPORTATION CO.,
Petitioner.
By EDWARD W. HAMILTON,
Counsel for Petitioner.

SANDERS, HAMILTON, DOBMEIER, CONNELLY & MCMAHON,
Attorneys for Petitioner.

United States of America,
State of New York, } ss.:
County of Erie.

Personally appeared before me the undersigned notary public, ~~Harry D. Sanders and John F. Connelly, and each~~ EDWARD W. HAMILTON, who being duly sworn on oath deposes and says: That he is the counsel for the within named petitioner Presque-Isle Transportation Co., a corporation; that he has personal knowledge of the matters mentioned in the foregoing Petition; that the allegations of the Petition are true to the best of his knowledge and belief, and that he has signed said Petition on behalf of the petitioner.

EDWARD W. HAMILTON.

Sworn to before me at Buffalo, New York,
this 23rd day of May, 1944.
Marie E. Harder,
Notary Public, Erie County, New York.
(Notarial Seal)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1943.

No. .....

PRESQUE-ISLE TRANSPORTATION CO.,
a Corporation,
Petitioner,

vs.

CARL KOEHLER,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

1.—The question of whether the participation of an employee in a fistic encounter warrants a finding that he is of a vicious and belligerent disposition under the facts proven.

2.—The question of whether the fact that an employee had a previous fistic encounter, in the absence of proof as to who is the aggressor, constitutes notice to employer of vicious character of employee.

3.—The question of whether employer is liable for injuries inflicted by one employee not acting within the scope

of his employment, or in the employer's interest, upon another employee.

4.—The question of failure to follow applicable decisions of this Court.

Statement of the Case.

This action was brought under the provisions of Title 46, Sec. 688, of the United States Code, to recover damages for injuries alleged to have been sustained by the Plaintiff as a result of the negligent acts of the Defendant in employing and retaining in its employ a member of the crew, with full knowledge of the fact that such member of the crew had threatened to inflict personal injuries on the Plaintiff, and with knowledge of his habitual belligerent nature, and in failing to give the Plaintiff any notice or warning thereof whatsoever. This member of the crew was referred to in the Complaint as "Jerry", and is identified as "Jerry Todd."

At the close of the Plaintiff's case the Defendant moved to dismiss the Complaint on the ground that the Plaintiff had failed to prove a cause of action, and, specifically, on the grounds that there was no evidence either that the acts of Todd were within the scope of his authority, or done in the furtherance of the master's interest. (Fols. 189-190.)

At the close of all the testimony the Defendant moved for the direction of a verdict of no cause of action in favor of the Defendant, on the ground that the Plaintiff failed to show the Defendant knew or had notice that Todd was of a vicious or belligerent character, that the altercation between the Plaintiff and Todd was a purely personal affair, and

on the ground that Todd was not acting within the scope of his authority or in the interest of the master. (Fols. 353-355.)

Upon this motion the Court reserved decision, and submitted three specific questions to the Jury, viz:

1. Was Todd of a vicious and belligerent nature, and likely to inflict bodily harm upon other members of the crew?

2. If so, was that fact known to the officers of the Ship, or should it have been known to them in the exercise of ordinary diligence?

3. Was Plaintiff's physical condition, as revealed by the Hospital records at Cleveland, the natural result of the injuries he received in the fight on the Ship? (Fol. 373.)

The Jury answered each specific question in the affirmative, and rendered a general verdict in favor of the Plaintiff, for $3,000.00. (Fol. 381.)

The Court thereupon entertained the Defendant's Motion for a Directed Verdict (Fols. 381-382), the decision of which had been reserved, and thereafter, on April 17, 1943, handed down a Decision granting the Motion. (Fols. 383-390.)

After a re-argument, and on July 30, 1943, the Court rendered a Decision allowing the verdict to stand. (Fol. 391.)

An Order was entered on this Decision on September 14, 1943, and, on the same day, Judgment for Plaintiff in the sum of $3163.00 was entered. (Fols. 393-397.) From the

Order and Judgment so entered, the Defendant has appealed to this Court. (Fols. 398-399.) The question presented upon this Appeal were raised by the Defendant's Motion for a Directed Verdict. It is the Defendant's claim that the evidence in its most favorable aspect to the Plaintiff does not justify a verdict against the Defendant.

The Facts.

The Plaintiff and Todd were both wheelsmen of the S. S. "Angeline", owned by the Defendant. On the night of November 21, 1940, the Steamer was lying at the dock of the Donner Steel Company in the Port of Buffalo. The Plaintiff's watch was from 6:00 o'clock to 10:00 o'clock P. M., and Todd's watch from 10:00 o'clock P. M. to 2:00 o'clock A. M. (Fol. 26.)

The Plaintiff testified that at about 9:30 o'clock Todd, who was to succeed him on watch, came aboard the boat; that he was intoxicated; that he yelled at the Plaintiff, started swearing and calling him names; that, as Plaintiff was walking along the passage-way, in the crew's quarters, towards his room, Todd called him from his (Todd's) room; that the Plaintiff entered and asked what was the matter, when Todd struck him on the chin; that the Third-Mate Fred Johnson, who was in the room with Todd, grabbed the Plaintiff and told him to go ashore "until this blows over"; that he did go ashore, and returned in about one hour and a half; that when he returned Todd was waiting for him at the ladder, and attacked him, knocked him down, and kicked him twice in the chest, once in the face and in his leg and groin; that he tried to get up but could not defend himself; that the Second-Mate rushed in and grabbed Todd; that the Plaintiff went to his room, and, when Todd

later tried to renew the fight, went ashore and got a Donner Steel Company policeman who, for some reason, after a discussion as to his jurisdiction, left the Boat; that on the following day the Plaintiff consulted Dr. Hoffman who treated him; that on the following day he went to Cleveland, and there, a week later, he went to work. (Fol. 34.) Plaintiff also testified that he saw a fight between Todd and a fireman on the dock at Milwaukee about October 19, 1940; that he "beat up" the fireman, but did not knock him out; that the fight did not last long.

Plaintiff also testified that in the galley, also at Milwaukee, Todd called names an oiler and a coal-passer, who were eating their lunch, and wanted them to come out and fight; that Todd had been drinking.

On cross-examination Koehler admitted that at the time of the first encounter he did not bleed, but that Todd did, from a cut on the lip. (Fol. 154.) He left the Boat the following morning, and did not ask for a hospital ticket. (Fol. 161.)

Todd testified that he returned to the ship about 10:00 o'clock; that he went up forward, and Plaintiff Koehler was there in the hall-way. Todd stated, "he jumped me for being late", and that one word led to another, and they started to fight; that Koehler punched him around quite a bit, knocked him down; that he struck his lip on the table in his room, and cut his lip; that it knocked loose a tooth, which he had to have extracted; that he bled very much. (Fols. 193-199.) That the altercation was started by Koehler's statement to Todd that "it was time you were getting back." (Fols. 197-198.)

They were separated by Third-Mate Johnson, and Fitch a Deck-Watch. (Fol. 194.) Koehler then went ashore and returned to the Boat about 1:00 o'clock. Todd testified that he was working on deck and saw Koehler coming down the dock; that he wanted to get even with him for what he had done, and waited for him at the ladder when he came up; then Todd said to Koehler, "Take your glasses off." Koehler said "Oh you are going to catch me when I am drunk." To which Todd answered, "No alibi." That Koehler took off his glasses; Todd hit him and knocked him down. Todd denied positively that he kicked him, or struck him after he was down. The Second-Mate came and stopped the affair. (Fols. 201-203.) Todd denied that he was drunk, but stated that he had two highballs at 4:00 o'clock in the afternoon before going to a show, and two highballs after the show, with his dinner; that he was accompanied throughout the afternoon and evening by Deck-Watch Joseph Fitch. Todd said he did not see any blood on Koehler after the second encounter. (Fol. 226.) Todd admitted the fight with the Fireman in Milwaukee. He denied that he threatened an oiler and coal-passer, as Koehler had testified. (Fols. 227-229.)

Joseph S. Fitch, a Deck-Watch on the Boat, testified that he spent the afternoon with Todd, having lunch at MacDoels, attending Shea's Buffalo Theatre, and having dinner afterwards at Pfeiffer's Marine Grill; that he had two highballs before the show, and either one, two or three with their dinner, and that Todd was not drunk; that he returned to the Boat with Todd, and that when he went forward, Todd, the Third-Mate Johnson, and the Plaintiff Koehler, were already in Todd's room. He was preparing to go on watch when he heard the noise. He came out, grabbed Todd, and Johnson grabbed Koehler; that he got blood all over

him from Todd who was bleeding from the nose; that the Third-Mate Johnson then told Koehler to go ashore, to get off the Boat and cool off; that Koehler left, and Fitch did not see the second encounter; that after the first encounter Koehler did not have a scratch on him, and Todd was bleeding badly. (Fols. 237-242.)

Frederick O. Johnson, the Third-Mate on the Boat, testified that he occupied a room with Todd; that on the evening of November 21st Todd appeared at about 10:00 o'clock when Johnson was in their room; that Todd and Koehler were having words about something, and they started to wrestle around there; that Todd got a bloody nose, and Johnson got them out into the hallway; that he was trying to separate them when Fitch came out, and they finally got them straightened out; Johnson said that Todd was bleeding and that Koehler did not seem to be marked in any way that he could see; that he advised Koehler to go ashore until both the men were cooled down; that he did not see any of the other fighting. (Fols. 255-258.)

Donald R. Morrison, the Second-Mate on the Boat, testified that he was on watch from 10:00 P. M. to 2:00 A. M.; that he did not see the first encounter, but, at about 10:00 o'clock he met Koehler coming aft as he was going forward, and Koehler said, "I had to hit him." He said, "Todd attacked me, I had to hit him." There were no marks on him. When he got in the hall there was blood in the hall, and Todd was in his room, and had a towel up to his face trying to stop the blood. He knew nothing more of the first fight. He testified that he stopped the second one; that when he got to the scene Koehler was on all fours on top of No. 12 hatch, and Todd was telling him to get up. Todd did not strike or kick Koehler after Morrison appear-

ed; that Morrison was in the First-Mate's room at about 2:00 o'clock where the First-Mate was dressing. The Plaintiff Koehler, and a Republic Steel policeman, appeared and demanded that Todd be turned over to the policeman. After a parley the policeman decided to leave Todd on board. (Fols. 269-276.)

Morrison testified that he had had occasion to observe Todd's behavior; that he was not quarrelsome; that he always observed orders; that he never knew him to make any trouble with anybody. (Fol. 296.) That he saw the fight between Todd and the Fireman on the dock at Milwaukee; that nobody was hurt, and they shook hands on the dock. They came aboard together as friends. (Fol. 297.)

John A. McDermid testified that he was in command of the vessel known as the "Cletores Snyder" that Koehler was a Wheelsman on the ship; that McDermid discharged him on April 2, 1940. (Fol. 301.) That the reason for discharging him was that Koehler and one of the wheelsmen got in a fight in Milwaukee; that he beat this wheelsman up, and, leaving Cleveland, he was intoxicated, and that he had been intoxicated leaving Marquette the trip before. (Fol. 305.)

George Russell, Captain of the "Angeline" testified that he was not on board on the night of the fight, and that when he arrived at the ship on the morning of November 22nd, Koehler saw him first and asked him to discharge Todd. He saw no marks on Koehler, and no evidence that he had been injured. (Fols. 325-326.) When he saw Todd that morning his nose was bloody, and there was blood on his face and lip.

Captain Russell testified that up to that time he had not heard of any fight between Todd and any other member of the crew; that he and nobody else had authority to hire and fire members of the crew, and that no person other than himself on that Boat had ever exercised the authority of hiring and firing. He further said that Todd had sailed with him all the Season of 1940; that he knew his character and disposition; that he had never had any trouble with him; that he did not know that "he had a reputation for belligerence", or of any threats of Todd against Koehler. (Fol. 347.)

POINT I.

There is no sufficient evidence to warrant a finding by the jury that Todd was of a vicious or belligerent nature.

The Plaintiff testified that he saw a fight on the dock at Milwaukee about October 19, 1940, between Todd and a Fireman; that the fight did not last long and no one was hurt. He also testified that at Milwaukee, in a galley, he heard Todd calling an oiler and a coal-passer names, and that he asked them to come out and fight; that Todd had been drinking.

These incidents alone, aside from the occurrences on the night of October 21, 1940, are claimed to be sufficient to prove the vicious and belligerent character of Todd, although there is no evidence as to the provocation for the affair on the dock at Milwaukee, nor as to who was the aggressor. The incident in the galley was trivial.

It cannot be expected that men serving as sailors will be of the type that turn the other cheek. They are red-blooded

vigorous men, and few if any of them go far to avoid a fistic encounter if provoked. There can be no finding of viciousness or belligerency without proof that attacks were unprovoked. There is no such proof.

POINT II.

There is no evidence of knowledge or notice to the employer of a vicious or belligerent propensity on the part of Todd.

The only evidence from which a semblance of argument can be made that the Boat had notice or knowledge of Todd's viciousness is the admitted fact that Todd had an encounter with the Fireman on the dock at Milwaukee. Don Morrison, the Second-Mate, saw it. He said that Todd did not "beat up" his opponent. Both went down. That they shook hands and came aboard as friends. He saw no other fighing by Todd; said he was not quarrelsome, and always obeyed orders. (Fols. 295-296.)

There is no evidence that the master of the Ship had any knowledge of any viciousness on the part of Todd. Captain Russell testified that up to the morning of November 22, 1940, he had not heard of any fight between Todd and any other member of the crew; no one had ever told him. (Fol. 33.) The Captain only had the authority to hire and fire Todd. (Fol. 334.) And nobody else ever exercised any such authority on that Boat. (Fol. 335.) The Captain had no-knowledge of any reputation for belligerency on the part of Todd, nor of his making any threats against Koehler.

As the Trial Judge said in his Decision of April 17, 1943, on the motion for a directed verdict:

"The evidence before the Jury, given in its most favorable aspect, was not sufficient to support the finding of the Jury that even if Todd was of a vicious and belligerent nature that fact was known to the officers of the ship, or should have been known to them in the exercise of ordinary diligence."

POINT III.

There is no evidence that Todd was acting in the master's interest, or within the scope of his authority at the time of the fight in which Koehler claims to have been injured.

Any discussion of evidence under this Point would be superfluous. The evidence in the case is all to the effect that the transactions between Todd and Koehler were strictly personal. They were of equal rank on the ship, and there can be no implication of any authority over Koehler on the part of Todd.

In the absence of evidence that Todd, in inflicting injuries on Koehler, was acting either in the master's interest or within the scope of his authority, there can be no recovery in this case.

In the case of *Bonsalem v. Byron S. S. Co.*, decided by the Second Circuit Court of Appeals, the plaintiff, a fireman on the ship, was the victim of assaults participated in by the Steward, the Captain, the Chief-Mate and other officers. The recovery in the District Court was reversed, the Court saying:

"Therefore, in the absence of allegation or proof to the contrary, the appellee cannot succeed with this libel. The ship or ship owner is not liable for injuries received by a seaman from an assault committed out-

side the scope of the employment of those on the vessel who are alleged to have assaulted him. This appellee was assaulted without provocation, and the assault was not committed by any officer of the vessel in furtherance of the appellant's business. The appellant did not authorize the officers of the ship to beat and assault him without cause or for a reason unconnected with the navigation of the ship."

Bonsalem v. Byron S. S. Co., 50 Fed. (2nd), 114.

And, in the case of Davis v. Green, the Supreme Court reversed a Judgment of the Supreme Court of the State of Mississippi sustaining a verdict for damages, based on an assault committed by a railroad engineer upon his fellow-employee, a conductor, resulting in the death of the latter. Mr. Justice Holmes, writing the Opinion of the Supreme Court, said:

"The ground on which the railroad company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment; but neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey,—in other words, that he did a wilful act wholly outside the scope of his employment while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies."

Davis v. Green, 260 U. S. 349.

The liability of a shipowner to an employee for damages resulting from negligence is no greater and no less than

that of a railroad company. The liability of the latter is governed by the provision of Title 45, Chapter 2, U. S. C. Title 46, Sec. 688, U. S. C. provides that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply."

The case of *Davis v. Green, supra,* and *Atlantic Coast Line v. Southwell,* 275 U. S. 64, arose under the railway liability act, and the rules of law there applied are equally applicable to the instant case.

Reasons for this Court Taking Jurisdiction.

1.—The question implied as to whether an employee who has a fight (justified or excused or not) must be thrown out of employment by the employer for his own protection.

The question is of great general interest, involving, as it does, the right of continued employment, and the risk of employer, growing out of employment.

2.—The question of the liability of an employer for an act of an employee outside of the scope of his employment, and in his personal interest.

This question is of the usmost importance and of the greatest general interest to all employers.

3.—The question of whether the authority of the cases of *Davis v. Green,* 260 U. S. 349, and *Atlantic Coast Line R. R. v. Southwell,* 275 U. S. 64, shall be brushed aside.

In the opinion of the Court below in the instant case, it is said that these cases 'indicate a contrary conclusion as to an ordinary employee, (but) they are not in point since the obligation of a ship owner for the safety of seamen is substantially greater than that of ordinary employers.'' This reasoning we challenge because the liability of a ship owner for negligence is founded upon the Statute, Title 45 U. S. C., Chap. 2, which extended the liability of common carriers for negligence to their employees, and which, by Sec. 688 of Title 46 U. S. C., was extended to and made applicable to ship owners. The question of whether a greater liability is placed upon ship owners than upon the operators of railroads by the identical Statute is of such public interest that it should be reviewed by this Court.

Respectfully submitted,

EDWARD W. HAMILTON,
Counsel for Petitioner.

SANDERS, HAMILTON, DOBMEIER, CONNELLY & MCMAHON,
Attorneys for Petitioner.

May 23, 1944.

IN THE

Supreme Court of the United States

October Term, 1943.

No. 1061

PRESQUE-ISLE TRANSPORTATION CO.,
a corporation,
Defendant-Petitioner,

against

CARL KOEHLER,
Plaintiff-Respondent.

BRIEF OPPOSING PETITION FOR CERTIORARI.

THOMAS C. BURKE,
EDWARD J. DESMOND,
JOHN E. DRURY, JR.,
Counsel for Respondent.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

October Term, 1943.

No. .....

PRESQUE-ISLE TRANSPORTATION CO.,
a Corporation,
Defendant-Petitioner,
against
CARL KOEHLER,
Plaintiff-Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Statement and Facts.

Respondent, a seaman on petitioner's Steamship "Angeline," a Great Lakes freighter, was viciously assaulted by one Todd, a fellow wheelsman, on November 21st, 1940, while on board the vessel, then lying at an ore dock at Buffalo. On October 20, 1940, while the vessel was at Milwaukee, Todd had assaulted another seaman in the presence of the second mate, so Todd's vicious nature was known to the vessel's officers.

Shortly before the assault in question the third mate had witnessed an assault by Todd on respondent and had told respondent to go ashore "until this blows over." The second mate having been told of this assault was working on the deck in the vicinity of the ship's ladder where Todd was waiting for respondent to return and the jury could, and probably did, infer that he saw Todd and doubtless surmised his purpose.

The vessel's officers took no steps to protect respondent from the impending assault, but after Todd had knocked down respondent and was kicking him, the second mate intervened.

Record, pp. 7-20 and 50-63.

Respondent sued under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, in the District Court for Western New York. The Court submitted the case to the jury for a general verdict and also submitted to it three special questions, viz.:

> "1. Was Todd of a vicious and belligerent nature and likely to inflict bodily harm upon other members of the crew?
>
> "2. If so, was that fact known to the officers of the ship, or should it have been known to them in the exercise of ordinary diligence?
>
> "3. Was Plaintiff's physical condition as revealed by the hospital record at Cleveland, the natural result of the injuries he received in the fight on the ship?"
>
> *Record*, pp. 124-125.

The jury returned a general verdict for respondent for $3,000, and answered all three questions in the affirmative (p. 127).

Petitioner appealed from the judgment (pp. 132-133); and the Court of Appeals for the Second Circuit unanimously affirmed. The opinion will be found at pp. 141-144 of the Record and is reported in 141 Fed. 2d., at page 490.

Circuit Judge Frank, for the Court, sets forth the facts quite fully, and said that the word "negligence," as used in the Jones Act, "must be given a liberal interpretation"; "that it includes any knowing or careless breach of any obligation which the employer owes to the seamen," among which "is that of seeing to the safety of the crew"; that "there is no such safety if one of the crew is a person having the character of Todd"; and that "consequently, the defendant is liable here because the ship's officers knew, or with ordinary diligence, should have known what Todd was like." Judge Frank further said that "in such circumstances, it is not material that Todd, when he assaulted plaintiff, was not acting in the course of his employment or in the interest of defendant."

Petitioner now petitions for certiorari.

ARGUMENT.

POINT I.

Petitioner was negligent within the Purview of the Jones Act.

The verdict of the jury, based upon substantial evidence, established these facts, viz.:

1. That petitioner failed in its duty to keep its vessel in a seaworthy condition by reason of the negligence of the vessel's officers in continuing the employment as a seaman of Todd, whose vicious and belligerent nature and

likelihood to inflict bodily harm upon other members of the crew was known to them;

2. That petitioner failed in its duty to protect and safeguard respondent in his employment by reason of the negligence of the vessel's officers in not protecting respondent from the assault by Todd, which they had every reason to anticipate.

3. That by reason of petitioner's failure in the respects aforesaid respondent was seriously injured.

These facts were a sufficient showing of negligence by petitioner under the Jones Act.

Jacob v. New York, 315 U. S. 752, 755.

In order to be seaworthy a ship must have a competent master and a competent crew, and the Court of Appeals for the Ninth Circuit, prior to the enactment of the Jones Act, held that a ship was not properly equipped for a voyage where the mate was a man known to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors.

The Rolph, 299 Fed. 52; cert. den. 266 U. S. 614.

It follows that where the ship's officers retain a seaman known to them to be of such a character they are negligent in their duty to maintain the ship in a seaworthy condition; such negligence is imputed to the owner by the Jones Act.

In *Jamison v. Encarnacion*, 281 U. S. 635, this Court said, p. 640, that the Federal Employers' Liability Act, incorporated in the maritime law by the Jones Act, "is intended to stimulate carriers to greater diligence for the safety of

their employees," and held that "it is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word [negligence] may be read to include all the meanings given to it by courts and within the word as ordinarily used"; and, p. 641, that "as unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the Act."

In *Sundberg v. Washington Fish & Oyster Co.*, 138 Fed. 2d. 801, the Court of Appeals for the Ninth Circuit followed the definition of "negligence" given in *Jamison v. Encarnacion, supra,* and held, where a seaman on a motorship was injured by a fellow seaman shooting at sea lions for amusement, of which practice the master knew, that it was for the jury to determine whether the master "should reasonably have anticipated the danger of bodily injury to a member of the crew," and hence whether, on the part of the shipowner, there was negligence under the Jones Act.

POINT II.

The cases in this Court relied upon by petitioner are not applicable.

The Court of Appeals well said:

> "In so far as *Davis v. Green*, 260 U. S. 349, and *Atlantic Coast Line R. R. v. Southwell*, 275 U. S. 64, indicate a contrary conclusion as to an ordinary employee, they are not in point since the obligations of a ship owner for the safety of seamen is substantially greater than that of ordinary employers."
>
> Record, p. 144.

In a very recent case this Court summarized the duty of petitioner to respondent as follows:

> "We have often had occasion to emphasize the conditions of the seaman's employment, see *Socony-Vacuum Co. v. Smith, supra*, [305 U. S. 424] 430-431 and cases cited, which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers."
>
> *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 103.

POINT III.

The Petition should be denied.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THOMAS C. BURKE,
EDWARD J. DESMOND,
JOHN E. DRURY, JR.,
Counsel for Respondent.